IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	ID: 0706000335
	)	
BOBBY L. MONROE,	)	
	)	
Defendant.	)	

Submitted: May 24, 2011
Decided: August 31, 2011

ORDER

Upon Defendant's Motion for Postconviction Relief Under Superior Court Criminal Rule 61 – DENIED.

1. On April 2, 2009, a jury convicted Monroe of two counts of Burglary in the Third Degree, one count of felony Criminal Mischief, and two counts of misdemeanor Theft. On the five convictions, Monroe was sentenced to a total of 44 months in prison, followed by probation at decreasing levels of supervision. The same jury acquitted Monroe of three other burglaries and thirteen related charges.

2. On direct appeal, Monroe claimed that his right to a fair trial by impartial jury was infringed because of juror bias. This, despite the jury's having

acquitted Monroe of most of the alleged crimes.

3. At trial, Monroe was represented by court-appointed counsel. On appeal, trial counsel moved to withdraw under Supreme Court Rule 26(c). The Court granted the motion, but because the Court could not conclude that Monroe's appeal was wholly without merit, it appointed conflict counsel. Monroe's court-appointed appellate counsel filed a brief making the juror bias claim.

4. On December 8, 2010, the convictions were affirmed.[1]

5. On January 18, 2011, Monroe, now *pro-se,* filed this, his first motion for postconviction relief. The motion is timely and procedurally proper. The motion was properly referred for preliminary consideration under Superior Court Criminal Rule 61(d)(1).

6. Despite the largely favorable verdict that trial counsel helped precipitate, the motion, in part, alleges ineffective assistance of both trial and appellate counsel.

7. Under Rule 61(g)(2) and *Horne v. State*,[2] the court directed both trial and appellant counsel to submit affidavits to be considered as part of the record. As contemplated by Rule 61(f)(1) and (g)(3), the court directed the State to respond

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[1]*Monroe v. State*, 9 A.3d 476 (Del. 2010) (TABLE).

[2]*Horne v. State*, 887 A.2d 973, 975 (Del. 2005).

and, consistent to Rule 61(f)(3) and (g)(3), the court gave Monroe leave to reply to the lawyers' and the State's submissions.

8. Former trial counsel filed an affidavit on February 23, 2011, and former appellant counsel filed his affidavit on March 28, 2011. The State filed a helpful response on April 11, 2011. Monroe replied on May 24, 2011.

9. At Monroe's trial, the State easily proved a truck belonging to Frito Lay was burglarized on May 17, 2007, and Frito Lay products, packaged for distribution not individual sale, were stolen. The same night, a nearby car wash was burglarized. There, car wash tokens and vehicle cleaning products were stolen. The burglar(s) did substantial damage to the car wash. Two weeks later, during the night of May 30, 2007, Monroe and another man were caught committing a burglary in Pennsylvania. Nearby, the Pennsylvania police found a dark SUV registered in Monroe's name. In the SUV were the car wash's stolen tokens and cleaning products. The police also found burglars tools, such as bolt cutters. The next day, in a van registered to Monroe, the police found boxes of Frito Lay products packaged for distribution. The van was driven by Monroe's wife. The police testified that Monroe's wife said that Monroe had put the products in the van two weeks earlier.

10. In summary, taken as a whole, the circumstantial evidence against Monroe was solid. Viewing the evidence in the light most favorable to Monroe, a not

guilty verdict was possible. Indeed, Monroe was found not guilty of three other burglaries and their related crimes. Viewing the incriminating coincidences' totality, however, there was ample evidence from which the jury could conclude beyond a reasonable doubt that Monroe committed the car wash and Frito Lay burglaries, and the related crimes.

11. Monroe raises four claims here:

1. ineffective assistance of counsel;
2. the Chief Investigating Officer's testimony was untrue;
3. the evidence pointed to Monroe's co-defendant, not Monroe, and the co-defendant's ex-girlfriend would testify that the co-defendant, not Monroe committed the burglaries; and
4. Appellant counsel should have done a better investigation concerning the claim against the juror.

12. Monroe's claims that the police lied at trial and the evidence pointed to his co-defendant were proper subjects for the trial, not for this postconviction relief proceeding. Consideration of them here is procedurally barred under Rule 61(i)(3). While the court can consider those things in the context of Monroe's ineffective assistance of counsel claims, the court is barred from reviewing the evidence again in this proceeding.

13. Monroe's ineffective assistance of counsel claims break into

several sub-parts. Actually, Monroe's motion largely consists of several pages of somewhat random allegations that are difficult to read and follow. Even with counsel's help, it has been difficult to get a handle on Monroe's numerous claims.

14. Monroe's ineffective assistance of counsel claim is one, four page, handwritten paragraph, which is almost stream of consciousness. In summary, Monroe offers a string of things that trial counsel did, or did not do, with which Monroe disagrees. Monroe's claim of ineffective assistance begins:

> My lawyer file[d] a motion of acquittal on the (5) charges the jury f[ou]nd me guilty of[.] [T]he judge denied it May 29, 2009. On my appeal he file[d] a Rule 26[(c)]. I call[ed] him and his office time after time to file motion on my behalf and he said O.K. but before[e] trial I ask[ed] and he told me the court turn[ed] down the motions and I see why because he fil[ed] it a week before trial. Before we pick[ed] the jury I ask[ed] him to ask can we put a lesser charge with my Burglary[s] and he told me the court can't do that[,] but after I get my time I fin[d] out he lie[d] to me about a lesser charge with my charges at trial. He talk[ed] to my witnesses hours befor[e] trial because he told them to come to his office a[t] 5:00 p.m[.] and he never came or called them at ll. This is the Lawyer the State gave me.

That continues for more than three more pages. Monroe's reply to counsels' affidavits picks up where his motion ends.

15. As can be seen, Monroe begins by assuming that his pretrial motions were denied because they were filed "a week before trial." The record does not confirm that. Next, assuming that trial counsel interviewed defense witnesses the evening before trial, as Monroe claims, that does not mean trial counsel failed to properly investigate the defense and prepare for trial. For example, it does not address what counsel did at other times. More importantly, it does not establish that trial counsel did not meet the standard of care, much less that earlier and better preparation would have resulted in acquittal on all counts. Again, trial counsel was well-enough prepared to obtain not guilty verdicts on most of the charges.

16. The court has reviewed the rest of Monroe's claims and they are all similarly conclusory and unsubstantiated. If Monroe's motion has a central claim, it probably is that he was entitled to acquittal based on insufficient evidence and his appellate lawyer should have pursued that claim. But, as discussed above, viewing it in the light most favorable to the State, there was enough evidence to support the convictions. The Frito Lay and the car wash burglaries took place at about the same time and about the same place. The proceeds of one burglary were found in Monroe's van, while the proceeds of the other burglary were found in his SUV. In the SUV, along with the stolen proceeds, there were burglars tools. Taken as a whole, that evidence tends to prove that Monroe was not only in receipt of the stolen property,

he was the thief. And, of course, the theft was accomplished through a burglary. So, it adds up. Anyway, the court can state conclusively that a motion for judgment of acquittal would not have succeeded. It does not appear that an appeal on that point would have done better. It bears mention that appellate counsel consciously chose not to pursue an insufficient evidence claim, and trial counsel moved to withdraw under Supreme Court Rule 26(c). So, trial counsel, the trial court, and appellate counsel agree. That has a bearing on the *Strickland v. Washington*[3] analysis.

17. Monroe's defense may not have been perfect, or even the best one possible. But, the court recalls trial counsel's having been familiar with the case and undertaking a well-conceived, largely successful defense. The same appears true for the appeal. There, appellate counsel raised the argument he considered worth raising: jury bias.

18. Finally, Monroe alleges that appellate counsel should have investigated the juror impartiality claim. It appears, however, Monroe does not see the difference between trial counsel's or appellant counsel's roles. Appellate counsel had to do the best he could with the record created in the trial court. More importantly, it is not shown that more investigation by appellate counsel would have produced a better result. Similarly, another lawyer might have argued insufficient

[3] 466 U.S. 668 (1984).

evidence. But, that is not the point. Monroe simply has not overcome the presumption that his lawyers were effective.

For the foregoing reasons, Defendant's motion for postconviction relief under Superior Court Rule 61 is **DENIED**. The Prothonotary **SHALL** notify Defendant.

IT IS SO ORDERED.

/s Fred S. Silverman
Judge

oc: Prothonotary (Criminal)
pc: Daniel G. Simmons, Deputy Attorney General
Christopher Tease,Esquire
Gregory Johnson, Esquire
Bobby L. Monroe, Defendant